Filed 4/14/03 Uremovic v. Felger CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOSEPH A. UREMOVIC,

Plaintiff and Respondent,

v.

WARREN P. FELGER,

Defendant and Appellant.

F039817

(Super. Ct. No. 626582-1)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Stephen J. Kane, Judge.

Felger & Associates, Warren P. Felger and Jennifer D. Reisz for Defendant and Appellant.

Joseph A. Uremovic, in pro. per., for Plaintiff and Respondent.

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Plaintiff and respondent Joseph A. Uremovic (Uremovic) filed suit against defendant and appellant Warren P. Felger (Felger), a former law partner, alleging claims for conversion and breach of fiduciary duty. Uremovic obtained a default and default judgment against Felger. Felger appeals the trial court's denial of his motion to set aside

the default and default judgment, pursuant to Code of Civil Procedure section 473.[1] We affirm.

PROCEDURAL AND FACTUAL HISTORIES

Uremovic and Felger were partners in a law practice until December 1998. On February 16, 1999, Uremovic filed suit against Felger and Felger's wife for conversion and breach of fiduciary duty. On February 24, 1999, a registered process server personally served Felger's wife with two copies of the summons and complaint at her home. The process server maintains she mailed a copy of the summons and complaint to Felger on the same day. Felger contends he never received a copy of the summons and complaint in the mail and was never made aware that one of the copies of the summons and complaint was intended for him.

On April 13, 1999, Felger received a letter from Uremovic advising that Felger's response was due on April 5 and that he would request entry of default if no answer was filed by the following day. Felger responded that the complaint had not been properly served on him.

On April 16, 1999, Uremovic obtained a default against Felger. Felger filed a motion to quash service of the summons. The court denied the motion, finding entry of Felger's default precluded his appearance in the action. The court expressly noted: "The denial is without prejudice to the filing of a Motion to Set Aside the entry of Default."

On November 16, 1999, Uremovic obtained a default judgment against Felger in the amount of $67,683.53. Felger appealed. On July 17, 2001, we affirmed the judgment. (See case no. F034522.) We found as follows:

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[1]All statutory references are to the Code of Civil Procedure unless otherwise indicated.

> "The important point is that the court gave [Felger] the opportunity to make a section 473 motion to set aside the default and he failed to take it. Even though defendant's motion was untimely under section 418.10, subdivision (a)(1), the logical reading of section 418.10, subdivision (d) is that a motion may still be made and deemed a special appearance if the defendant combines it with a motion to set aside the default or default judgment under section 473. In any event, the court clearly applied the proper legal standards in reaching its ruling." (Fn. omitted.)

On November 1, 2001, Felger filed a motion, pursuant to section 473, to set aside the default and default judgment. The court denied the motion. This appeal followed.

DISCUSSION

Felger argues the trial court erred in denying his motion to set aside the default and default judgment based on the following: 1) the court failed to consider evidence that the proof of service was invalid and the default judgment was therefore void on its face; 2) the default judgment was void due to extrinsic fraud; and 3) equitable defenses should not have barred relief. Felger maintains the trial court should have granted the motion under either section 473, subdivision (d), pertaining to relief from a void judgment or its equitable power to set aside a judgment on the ground of extrinsic fraud. We address each of these two grounds below.

I. Relief under section 473, subdivision (d)

The court has the power, pursuant to section 473, subdivision (d), to set aside a judgment that is void, as a matter of law, due to improper service of process. However, substantial compliance with the service-of-summons statutes is sufficient to defeat a motion under section 473, subdivision (d). (See *Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544 [statutes governing substitute service are liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant]; *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 313-314 [strict compliance with statutes governing service of process not required].)

A judgment void on its face is subject to collateral attack at any time. (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239; *Plotitsa v. Superior*

Court (1983) 140 Cal.App.3d 755, 761 [a default void on the face of the record when entered is subject to challenge at any time irrespective of lack of diligence in seeking to set it aside within the six-month period of section 473].) However, a motion for relief from a judgment valid on its face but void for improper service is governed by analogy to section 473.5, relating to relief for lack of actual notice. The relief must be sought within a reasonable time, but in no event exceeding the earlier of 1) two years after entry of the default judgment, or 2) 180 days after service of written notice of the default or default judgment. (*Gibble v. Car-Lene Research, Inc.*, *supra*, 67 Cal.App.4th at p. 301, fn. 3; *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1121-1124; *Thorson v. Western Development Corp.* (1967) 251 Cal.App.2d 206, 210-211; § 473.5.)

In this case, contrary to Felger's assertions, the default judgment is not void on its face. The proof of service of the summons and complaint appears valid on its face. The core of Felger's argument is that the process server engaged in fraud in signing the proof of service—specifically, that the person who effectuated service was not the person who signed the proof of service. But this is not apparent on the face of the record. Thus, the judgment is valid on its face, and Felger had to meet the requirements of section 473.5 to timely file a motion for relief from the default judgment.[2]

Uremovic did not establish written notice of entry of the default or default judgment. Therefore, the motion to set aside the judgment had to be filed within two

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[2]Citing to *Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, Felger argues the Court has discretion to review the entire record in determining whether the judgment is void on its face. *Plaza Hollister* is distinguishable. It held that a stipulated judgment was void to the extent it was contrary to the provisions of the Revenue and Taxation Code. (*Plaza Hollister, supra,* 72 Cal.App.4th at p. 33.) By contrast, in this case, there is disputed evidence in the record regarding whether the process server engaged in fraud based on conflicting deposition testimony and declarations.

years after entry of the judgment. Felger did file his motion 15 days before expiration of the two-year period. However, the trial court found that Felger had actual notice of the action, stating: "It appears undisputed that [Felger] knew about the lawsuit even before the complaint was served, when a draft complaint was faxed to him, and certainly knew about it after Mrs. Felger, whom he represented, was served." A trial court's findings regarding actual notice of the action are reviewed for an abuse of discretion. (*Ellard v. Conway*, *supra*, 94 Cal.App.4th at p. 547.) On this record, we find no such abuse. In light of Felger's actual notice, we agree with the trial court that Felger did not establish the reasonable time period requirement of section 473.5.

II. Equitable relief

A court also has inherent, equitable power to set aside a judgment on the ground of extrinsic fraud or mistake. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 575-578.) When a default judgment has been obtained, equitable relief is given only in exceptional circumstances. "'[W]hen relief under section 473 is available, there is a strong public policy in favor of granting relief and allowing the requesting party his or her day in court. Beyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional circumstances should relief be granted.' [Citations.]" (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981-982.)

In order to obtain equitable relief based on extrinsic fraud or mistake, the party in default must satisfy a stringent three-part test: 1) demonstrate he has a meritorious case; 2) articulate a satisfactory excuse for not presenting a defense to the original action; and 3) demonstrate diligence in seeking to set aside the default once discovered. (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 982.) Moreover, since the court is invoking its equitable power, the relief sought is subject to equitable defenses, including laches. (*Id.* at p. 983; *McCreadie v. Arques* (1967) 248 Cal.App.2d 39, 46-47.) We review a challenge to a trial court's order denying a motion to vacate a default on equitable grounds for an abuse of discretion. (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 981.)

Here, the trial court made the following findings:

> "[Felger] knew that his default had been entered sometime in the latter part of April, 1999. While his motion to quash service of summons, heard and denied on June 8, 1999, might have excused his failure to move to set it aside until then, certainly after that date, he should have moved diligently to do so. [Felger] has not provided a satisfactory explanation why, between June 8, 1999, and November 16, 1999, he did not move to set aside the default. [Felger's] motion to set aside the default could have been combined with a motion to quash, to preserve [Felger's] objections to the manner of service of summons."

The court further concluded that "[Uremovic] has noted several instances where he will be prejudiced in trying the *Felger v. Uremovic*[3] case if the default and default judgment in this case are set aside less than one week before trial in that action."

The record supports the trial court's findings. We find no abuse of discretion. In fact, in this appeal, Felger has wholly failed to set forth evidence that he satisfied the three-part test necessary for equitable relief based on extrinsic fraud.

DISPOSITION

The judgment is affirmed. Costs are awarded to Uremovic.

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Wiseman, J.

WE CONCUR:

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Dibiaso, Acting P.J.

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Harris, J.

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[3]In a separate action, Felger filed suit against Uremovic and the process server for fraud, abuse of process and related claims.